

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MIKRON INDUSTRIES, INC.,

Plaintiff,

v.

HURD WINDOWS & DOORS, INC., *et al.*,

Defendants.

Case No. C07-0532RSL

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION TO  
DISMISS.

**I. INTRODUCTION**

This matter comes before the Court on "Plaintiff's Motion to Dismiss Defendants' Fraud and Misrepresentation Counterclaims and to Strike Punitive Damages Request" (Dkt. #22). On April 11, 2007, plaintiff filed a complaint for damages and declaratory relief based upon defendants' alleged breach of the MikronWood Supply Agreement, entered into by both parties on July 2, 2002. Complaint at 9-13. On August 8, 2007, defendants filed an amended answer with counterclaims, including allegations of fraud and misrepresentation and a demand for punitive damages. Amended Answer with Counterclaims at 11-12. Plaintiff now requests that the Court dismiss defendants' fraud and misrepresentation counterclaims and strike defendants' demand for punitive damages. For the reasons set forth below, the Court GRANTS IN PART plaintiff's motion to dismiss: defendants' fraud and misrepresentation counterclaims are

1 dismissed with leave to amend. Plaintiff's motion to strike defendants' demand for punitive  
2 damages is DENIED.

## 3 II. DISCUSSION

### 4 A. Defendants' fraud and misrepresentation counterclaims lack the specificity required 5 by Rule 9(b).

6 Federal Rule of Civil Procedure 9(b) requires that in "all averments of fraud or mistake,  
7 the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b)'s  
8 heightened pleading standard also applies to claims for misrepresentation. See Moore v.  
9 Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Ninth Circuit authority  
10 provides definitive guidance on the degree of particularity required by Rule 9(b): "[a]verments  
11 of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct  
12 charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)(quoting Cooper  
13 v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). See also Semegen v. Weidner, 780 F.2d 727, 731  
14 (9th Cir. 1985)("Rule 9(b) ensures that allegations of fraud are specific enough to give  
15 defendants notice of the particular misconduct which is alleged to constitute the fraud charged  
16 so that they can defend against the charge and not just deny that they have done anything  
17 wrong.").

18 Defendants' counterclaims for fraud and misrepresentation fail to specify the time, place,  
19 and identities of the parties to the alleged misrepresentations. Amended Answer with  
20 Counterclaims at 7, 11-12. Moreover, because defendants' allegations of fraud are so vague and  
21 generalized, plaintiff has insufficient detail to adequately prepare its defenses. The Court finds  
22 that defendants' counterclaims fail to meet Rule 9(b)'s heightened pleading requirements for  
23 fraud and misrepresentation.

24 Defendants correctly note that Ninth Circuit law favors granting leave to amend unless it  
25 is clear "that the complaint could not be saved by any amendment." McKesson HBOC, Inc. v.  
26 New York State Common Ret. Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003). Accordingly,

1 the Court dismisses defendants' fraud and misrepresentation counterclaims and grants  
2 defendants 20 days to amend those claims.

3 **B. The statute of limitations does not presently bar defendants' fraud counterclaim.**

4 Washington law provides that a cause of action for fraud "shall be commenced within  
5 three years" and that "the cause of action in such case [is] not to be deemed to have accrued  
6 until the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080(4).  
7 Although the defense of the statute of limitations may be raised by a Fed. R. Civ. P. 12(b)(6)  
8 motion to dismiss, the running of the statute must be evident on the face of the pleading. Jablon  
9 v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). Washington law provides that a cause  
10 of action accrues when a party knows or should know through the exercise of due diligence of  
11 the relevant facts. Allen v. State, 118 Wash.2d 753, 758, 826 P.2d 200, 203 (1992). Analysis of  
12 due diligence raises issues of fact. Id. at 760, 204.

13 Nothing in the existing record makes it evident on the face of the pleadings when  
14 defendants' fraud claim accrued. Plaintiff argues that because defendants filed their  
15 counterclaim on August 8, 2007, any alleged misrepresentations before August 8, 2004 would  
16 exceed the statute of limitations. Motion at 8. Plaintiff goes on to argue that because the parties  
17 maintained an ongoing business relationship since entering into the MikronWood Agreement on  
18 July 2, 2002, and because defendant received customer complaints about plaintiff's product,  
19 defendants discovered or should have discovered any misrepresentations before August 8, 2004.  
20 Motion at 8-9. Given the basic facts surrounding this dispute, defendants may well be able to  
21 prove that they did not discover, and could not reasonably have discovered, any  
22 misrepresentations until after August 8, 2004, notwithstanding the ongoing relationship and/or  
23 customer complaints. The Court therefore denies plaintiff's motion to dismiss defendants' fraud  
24 and misrepresentation counterclaims based upon the running of the statute of limitations.

**C. Defendant adequately states a claim for punitive damages.**

Although the MikronWood Supply Agreement specified that “[t]his agreement shall be controlled and interpreted under the internal laws of the State of Washington,” Exhibit A to Claim at 4, defendants’ fraud and misrepresentation counterclaims also sound in tort. Claims arising in tort are not “ordinarily controlled by a contractual choice of law provision” but are instead “decided according to the law of the forum state.” Sutter Home Winery, Inc. v. Vintage Selections, Ltd., 971 F.2d 401, 407 (9th Cir. 1992)(quoting Consolidated Data Terminals v. Applied Digital Data Systems, 708 F.2d 385, 390 n. 3 (9th Cir. 1983)). Defendants correctly note that the Washington Supreme Court has been hesitant to decide a conflict of law case based upon a record “in which the facts may develop in a number of ways before us at trial, reducing our opinion to nothing more than an advisory opinion.” Southwell v. Widing Transp., Inc., 101 Wn.2d 200, 207, 676 P.2d 477, 481 (1984). Here, as in Southwell, the record is insufficiently developed to provide the necessary facts to permit the Court to conduct a choice of law analysis. Accordingly, the Court finds that a conflict of law analysis would be premature at this point in the proceedings.

Should at some point in the future the Court determine that Wisconsin law governs defendants’ tort claims, defendants’ demand for relief would be sufficient to satisfy the notice pleading requirements under both Wisconsin law and the Federal Rules of Civil Procedure.<sup>1</sup> Under the Federal Rules of Civil Procedure, a pleading need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief, and ... a demand for judgment for the relief the pleader seeks.” Fed R. Civ. P. 8(a). Furthermore, allegations of “[m]alice, intent, knowledge and other condition of mind of a person may be averred generally.” Fed. R. Civ. P. 9(b). Wisconsin law provides virtually identical direction for the contents of

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<sup>1</sup> Since both Federal and Wisconsin Rules of Civil Procedure have virtually identical notice pleading requirements, it is unnecessary at this point for the Court to determine whether Federal or Wisconsin pleading requirements govern defendants’ demand for punitive damages.

1 pleadings. See Wis. Stat. 802.02. Although Wisconsin law limits punitive damages to instances  
2 of malice or intentional disregard for another party's rights, Wis. Stat. 895.043(3), it does not  
3 impose any type of heightened pleading standard. Under Wisconsin law, a claim for punitive  
4 damages "should be dismissed as legally insufficient only if it is clear that plaintiff cannot  
5 recover under any condition." Wangen v. Ford Motor Co., 97 Wis.2d 260, 308, 294 N.W. 2d  
6 437, 462 (1980).

7 In the present situation, defendants' counterclaim characterizes plaintiff's  
8 misrepresentations as "deceitful and totally contrary to the rights of [defendant]." Amended  
9 Answer with Counterclaims at 11-12. Thus, in averring a disregard for their rights in general  
10 terms, defendants' counterclaim is sufficient to meet the notice pleading requirement for a  
11 demand for punitive damages under Wisconsin law. Accordingly, the Court denies plaintiff's  
12 motion to strike defendants' demand for punitive damages.

### 13 III. CONCLUSION

14 For all of the foregoing reasons, "Plaintiff's Motion to Dismiss Defendants' Fraud and  
15 Misrepresentation Counterclaims and to Strike Punitive Damages Request" (Dkt. #22) is  
16 GRANTED IN PART. The Court GRANTS plaintiff's motion to dismiss defendants' fraud and  
17 misrepresentation counterclaims and dismisses those claims with leave to amend. Defendant  
18 must amend the fraud and misrepresentation counterclaims within 20 days of the date of this  
19 order. The Court DENIES plaintiff's motion to strike defendants' request for punitive damages.  
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21 DATED this 12th day of October, 2007.

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24 Robert S. Lasnik  
25 United States District Judge  
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